

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

kb

May 25, 2021

Cancellation No. 92025859

*Empresa Cubana Del Tabaco d.b.a
Cubatabaco*

v.

General Cigar Co., Inc.

Katie Bukrinsky, Interlocutory Attorney:

This proceeding comes before the Board on Respondent's motion, filed May 3, 2021, to strike the rebuttal testimony of Dean J. Gluth, Charles Linehan, and Susan Bailey. 333 TTABVUE. Petitioner filed a response to the motion. 335, 336 TTABVUE. The time for Respondent to file a reply brief has not yet expired.

I. Background¹

On March 31, 2021, the parties had a telephone conference with the undersigned Interlocutory Attorney, wherein Respondent was given leave to file its motion to strike. On April 6, 2021, the parties filed a stipulation that requested, in relevant part, that the Board defer resolution of Respondent's motion to strike until final decision. 331 TTABVUE. Inasmuch as at that time Respondent had not yet filed the

¹ The Board presumes the parties' familiarity with the history of this proceeding and accordingly reviews the background only to the extent relevant to this motion.

motion to strike, the Board deferred consideration of the parties' request. 332 TTABVUE 4. On May 3, 2021, Respondent filed the motion to strike.

II. Motion to Strike

Respondent moves to strike the testimony of Messrs. Gluth and Linehan, private investigators hired by Petitioner, and Ms. Bailey, a non-attorney employee of Petitioner's counsel. 333 TTABVUE. With respect to Messrs. Gluth and Linehan, Respondent argues that they were not disclosed in Petitioner's initial disclosures, discovery responses, and/or pretrial disclosures when they should have been, and instead were for the first time disclosed in Petitioner's rebuttal disclosures. 333 TTABVUE 19-20. With respect to Ms. Bailey, Respondent argues that she does not have personal knowledge of the subject matter of her testimony, and that her testimony is cumulative of evidence introduced during Petitioner's trial period. 333 TTABVUE 14. Finally, with respect to all three witnesses, Respondent argues that their testimony constitutes improper rebuttal evidence inasmuch as it bolsters Petitioner's claim of likelihood of confusion, and accordingly should have been submitted during Petitioner's trial period. 333 TTABVUE 3, 12-17.

Petitioner responds that its identification of Messrs. Gluth and Linehan for the first time in rebuttal disclosures is substantially justified or harmless; that the testimony of all three witnesses constitutes proper rebuttal; and that in any event the issues raised by Respondent's motion are properly deferred to final decision. 336 TTABVUE 8-18.²

² To the extent Petitioner also argues that Respondent's motion should be denied in part because it exceeds the scope of leave granted by the Interlocutory Attorney, *see* 336

It is the policy of the Board not to read trial testimony or examine other trial evidence prior to final decision. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1047 (TTAB 2017); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1263 (TTAB 2003); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1233 (TTAB 1992); TBMP §§ 502.01, 532, 533.03. Thus, the Board does not ordinarily strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, such objections are considered by the Board in its evaluation of the probative value of the testimony at final hearing. *See id.*

Respondent's objections that Ms. Bailey's testimony is cumulative and incompetent, and that all three witnesses' testimony constitutes improper rebuttal, are substantive. *See Weyerhaeuser*, 24 USPQ2d at 1233; TBMP § 532. Further, Respondent's motion to strike the testimony of Messrs. Gluth and Linehan for failure to timely disclose these witnesses is inextricably linked to Respondent's argument that these witnesses are offering improper rebuttal testimony.

In view of the foregoing, the parties' stipulated motion to defer consideration of Respondent's motion to strike is **granted** as well taken. Respondent's motion to strike is **deferred** until final decision.³

Dates in this proceeding remain as set in the Board's April 13, 2021 order.

TTABVUE 3-4, the argument is not well taken. The Interlocutory Attorney did not limit Respondent's motion in the manner urged by Petitioner. *See, e.g.* 332 TTABVUE 3 and n.2.

³ Respondent should renew its objections in its trial brief on the case. *See* TBMP § 801.03. Evidentiary objections that may be raised in a party's brief may instead be raised in an appendix or by way of a separate statement of objections. Trademark Rule 2.128; TBMP § 801.03.